Petition

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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, Florida Marble Polishers Pension Trust Fund, Florida Marble Polishers Holiday and Unemployment Trust Fund and Florida Marble Polishers District Council, *Petitioners*,

v.

EDWIN M. GREEN, INC., a Florida Corporation and Green's Pool Service, Inc., a Florida Corporation, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether a provision in a construction industry collective bargaining agreement that includes within its definition of employer, corporations that are owned, controlled or operated by one or more members, stockholders or officers of the firms executing the agreement is, per se, violative of Sections 7 and 9(b) of the National Labor Relations Act, 29 U.S.C. §§ 157 and 159(b).

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FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, Florida Marble Polishers Pension Trust Fund, Florida Marble Polishers Holiday and Unemployment Trust Fund and Florida Marble Polishers District Council, *Petitioners*,

v.

EDWIN M. GREEN, INC., a Florida Corporation and Green's Pool Service, Inc., a Florida Corporation, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Florida Marble Polishers Health and Welfare Trust Fund, Florida Marble Polishers Pension Trust Fund, Florida Marble Polishers Holiday and Unemployment Trust Fund and Florida Marble Polishers District Council respectfully pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered August 17, 1981 as modified on Petition for Rehearing on October 28, 1981.

OPINIONS BELOW

The Order of the United States District Court for the Southern District of Florida is unreported and is printed in the Appendix at pages 12a-21a. The opinion of the United States Court of Appeals for the Fifth Circuit dated August 17, 1981 is reported at 653 F.2d 972 (5th Cir. 1981) and is reproduced in the Appendix at pages 1a-9a. The Modification of the Court of Appeals Opinion on Petition for Rehearing dated October 26, 1981 is not reported and is reproduced in the Appendix at pages 10a-11a.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 17, 1981. Upon timely Petition for Rehearing, the Court modified its opinion on October 28, 1981. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves the following sections of the National Labor Relations Act:

1. Section 7, 29 U.S.C. § 157, (Appendix, page 36a).

2. Section 8(f), 29 U.S.C. § 158(f), (Appendix, page 36a).

3. Sections 9(a) and (b), 29 U.S.C. § 159(a) and (b), (Appendix, page 37a).

STATEMENT OF THE CASE

This was an action brought by Petitioners, three union benefit trusts and a labor organization pursuant to Section 301(a), Labor Management Relations Act of 1947, 29 U.S.C. § 185 for the collection of unpaid benefits on behalf of employees under a collective bargaining agreement.

The Respondents, defendants in the District Court and Appellees below, are Edwin M. Green, Inc. ("EMG") a corporation that has been engaged in the business of constructing swimming pools since 1950 and Green's Pool Service, Inc., ("GPS") a corporation formed in 1965 to do pool service and maintenance work. GPS has, since 1971, also engaged in constructing swimming pools in the same geographical area as EMG.

EMG is a party to a collective bargaining agreement with the Florida Marble Polishers District Council. GPS operates as a non-union contractor. The Petitioners sought to hold both EMG and GPS responsible for the failure of GPS to pay benefits into the various trust funds on behalf of its employees.

The Petitioners based their claims on two theories: (1) In the circumstances of this case, the Respondent corporations are a single employer under Section 2(2) of the NLRA, 29 U.S.C. § 152(2), and both are bound by the terms of the collective bargaining agreement; (2) regardless of the single employer issue, the corporations are bound by the terms of the collective bargaining agreement which broadly defines "employer" as a corporation which is owned, controlled or operated by one or more members, stockholders or officers of the firm that executed the collective bargaining agreement. [1]

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[1] The relevant portion of the collective bargaining agreement, Article XI, Section 4 is set out in the Appendix, p. 22a.

The case was submitted to the District Court on Petitioners' Motion for Partial Summary Judgment and Respondents' Motion for Summary Judgment. The facts were contained in two stipulated statements. The District Court concluded that GPS was not the alter ego of EMG, denied Petitioners' motion and entered Judgment for the Respondents. It did not comment on the Petitioners' second issue, although this was stressed in their Petition for Rehearing, which was denied.

On appeal, the Court held that the record fully supported the findings and conclusions of the District Court that the two corporations were not a single employer. This ruling is not challenged in this Petition.

The Fifth Circuit went on to hold that the portion of the Collective Bargaining Agreement that defines "employer" (Article XI, Section 4, A.22a) is contrary to Section 7 of the NLRA, 29 U.S.C. § 157 which protects the rights of employees to self determination and is a usurpation of the rights of the National Labor Relations Board to determine the appropriate bargaining unit for the employees of GPS, Section 9(b) of NLRA, 29 U.S.C. § 159(b).

The question of the legality of the "employer" definition had not been raised or argued in the District Court, nor was it briefed in the Court of Appeals. The Petitioners herein, moved the Court for a rehearing, particularly stressing Section 8(f) of the NLRA, 29 U.S.C. § 158(f), which provides that it shall not be an unfair labor practice for an employer in the construction industry to execute an agreement with a union that has not attained majority status.

Whereupon, the Fifth Circuit modified its opinion, adding the following sentence:

> "That EMG and GPS were engaged primarily in the construction industry would not under 29 U.S.C., § 158(f) make the agreement between EMG and the District Council applicable to GPS as a separate employer." (A. 10a-11a).

THE RELATIONSHIP OF EMG AND GPS.

Edwin M. Green and his mother each own fifty percent of the stock of EMG. The record fails to reflect that his mother participates in the operation of the business. Green is the President of EMG. Until 1977, Green was primarily occupied with sales, marketing and administration. A general superintendent, Jack Eddington, handled the construction end of the business. When Eddington retired, Green assumed his duties as well.

In his capacity as President of EMG, Green executed the collective bargaining contract with the Florida Marble Polishers District Council.

Green owns ninety-eight percent of the stock of GPS and until March, 1979 was its President. From its inception in 1965 until March, 1974, GPS was primarily run by its then Vice President and General Manager, Charles Bromley. During this period, Green, as the corporation's chief stockholder, was consulted about major policy decisions made with respect to the operation and management of GPS.

When Bromley left the business in 1974 Green controlled and operated the business. Bromley returned in 1977 and resumed his old position until May, 1978 when he left for good. Green resumed control in May, 1978 and continued to operate the business until April, 1979 when a new general manager was employed. At that time Green resigned as President and thereafter gave his major attention to the affairs of EMG. His ninety-eight percent ownership of GPS has remained constant.

GPS entered the construction business in 1971 due to the emergence of competing non-union swimming pool construction companies. This was in addition to its maintenance and service work. Since that time GPS has employed workers and performed work generally within the trade and territorial jurisdiction of the collective bargaining agreement.

REASONS FOR GRANTING THE WRIT.

I. The Decision Of The Court Of Appeals Misconstrues The Relationship Of Section 8(f) And Section 7 Of The NLRA.

The Court of Appeals rationalized its decision in part on the basis that the provision in the Collective Bargaining Contract between the District Council and EMG violated the Section 7 self determination rights of GPS's employees. When Section 8(f) was called to the Court's attention, it held to its opinion without any attempt at explaining the inapplicability of Section 8(f) to the contract provision it was construing.

8(f) permits unions and employers in the construction industry to enter into "pre-hire"[2] agreements without the union having to prove majority status. The agreements are voidable, prior to the union attaining majority status, *NLRB* v. *Local 103, International Association of Bridge, Structural and Ornamental Iron Workers (Higdon Construction Co.)*, 434 U.S. 335, 54 L.Ed.2d 586, 98 S.Ct. 651 (1978).

Although it is a completed collective bargaining agreement as to EMG, the present agreement is a "pre-hire" agreement as to GPS. As such, it does not violate Section 7 rights unless the union and the employer enter into a full fledged collective bargaining agreement without the union having attained a majority status, Higdon, *supra*. Obligations undertaken pursuant to a pre-hire agreement and prior to it either ripening into a collective bargaining agreement or being disavowed by the employer are valid if not otherwise violative of the law, Higdon, *supra*.

The questions of whether a related company is an alter ego and whether it is bound to the provision of an agreement

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[2] The term "prehire" does not describe all contracts under 8(f) inasmuch as the agreements can be entered into where the employer already has a complement of employees, Progressive Construction Corp., 218 NLRB No. 209, 89 LRRM 1465 (1975).

incorporating it within the definition of "employer" are not identical. A firm may not be an alter ego and yet be bound to a contract if, under all of the relevant circumstances, there was the intent that it be bound to the contract and the person executing the contract had the authority to bind it.

Ordinary principles of agency apply to labor contracts, *Warrior Constructors, Inc.* v. *International Union of Operating Engineers, Local Union No. 926*, 383 F.2d 700, 706 (5th Cir. 1967) and the parties to such a contract have a right to assume that the person executing the agreement on behalf of the other party has the authority to do so, *National Labor Relations Board* v. *Beckham, Inc.*, 564 F.2d 190, 194 (5th Cir. 1977); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1060 (10th Cir. 1971), see also, *Authorized Air Conditioning* v. *NLRB*, 606 F.2d 899, 905 (9th Cir. 1979).

Certainly, Edwin M. Green, the President and ninety-eight percent owner of GPS could have bound it to the collective bargaining agreement. Unfortunately, neither of the Courts below dealt with Green's authority to bind EMG.

Admittedly, the "employer" clause, if carried to its extreme, would include firms that are too remote from the parties to be bound. That is not the case with GPS and it may not be the case with other employers that executed this agreement.

By painting with a broad brush, the Court of Appeals has precluded a factual determination as to whether Green and the other employers intended and had authority to bind related companies to pre-hire contracts. The same may be said for other similar contracts in the construction field.

Under the rubric of "employee rights," the opinion below outlaws legitimate contractual arrangements between consenting parties. Nothing in this record suggests that Green was fraudulently induced to execute the contract. It must be

assumed that when he did so, he was aware that GPS would fall within the scope of Article XI, Section 4. Whether or not he contractually bound GPS is a matter of contract construction for the District Court.

The Court of Appeals in going far beyond this factual enquiry, has severely limited the scope of Section 8(f) and thrown into doubt contractual arrangements entered into in good faith under that provision.

II. Contracting Parties May Define The Relevant Bargaining Unit Without Seeking Approval Of The NLRB.

The second reason given by the Court of Appeals for invalidating the agreement is that the parties have usurped the authority of the NLRB to determine the appropriate bargaining unit for the employees of EMG, 653 F.2d at 976. This holding seriously misconstrues Section 9(b) of the NLRA, 29 U.S.C. § 159(b).

Although Section 9(b) grants the Board broad power to define the bargaining unit, *Douds* v. *International Longshoremen's Association*, 241 F.2d 278 (2d Cir. 1957), it does not require that the Board determine every unit in the first instance. To the contrary, the scope of the bargaining unit is a permissive subject of bargaining, see, *Canteburg Gardens*, 238 NLRB No. 116, 99 LRRM 1279 (1978); *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB No. 218, 98 LRRM 1475 (1978); *Retail Clerks Union Local No. 324*, 144 NLRB No. 108, 54 LRRM 1226 (1963); and *National Fresh Fruit & Vegetable Co.*, 227 NLRB No. 293, 95 LRRM 1011 (1977), enforcement denied, *National Fresh Fruit & Vegetable Co.* v. *NLRB*, 565 F.2d 1331 (5th Cir. 1978).

The considerations that may be applicable when the Board makes its own determination of the unit do not apply when it reviews a unit agreed upon by the parties, *NLRB* v. *J. Collins' Sons, Inc.*, 332 F.2d 523 (7th Cir. 1964). In Collins, the company and the union had defined the unit in a stipulation for a

consent election. The 7th Circuit held that in such a situation the Board was limited to construing the intent of the parties. Even where the Board has originally fixed the unit, the parties may alter it by agreement, *Douds* v. *International Longshoremen's Association*, 241 F.2d 278 (2nd Cir. 1957).

The Court's reliance on *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352 (9th Cir. 1970) and *NLRB* v. *Sunset House*, 415 F.2d 545 (9th Cir. 1969) is misplaced. These cases do not stand for the proposition that the bargaining unit must be submitted to the Board. They simply hold permissable the Board's policy of requiring an election prior to permitting a subsequently established single location store to be absorbed into an existing multiple-location unit. A contrary position was taken in *NLRB* v. *Appleton Electric Co.*, 296 F.2d 202 (7th Cir. 1961).

Furthermore, the facts of the present case differ substantially from those in Sheraton-Kauai and Sunset House. This case involves an existing unit in the construction industry, not a subsequent unit in the retail industry. The Section 8(f) construction industry exception permits a union and employer to enter into contracts that might run afoul of the Sheraton-Kauai and Sunset House policy.

The Board has not applied that policy to the construction industry. It was inappropriate for the Court of Appeals to do so in view of the policy expressed in Section 8(f) and without a clear indication of the Board's position.

The effect of the Court's opinion is to require a unit determination by the Board in all pre-hire situations. The adoption of such a policy would completely nullify Section 8(f), to the detriment of both unions and employers. Section 8(f) was enacted to promote industrial peace in the construction industry, to permit employers to determine in advance their labor costs and to have available a supply of skilled craftsmen ready for quick referral, *Higdon, supra.*, 434 U.S. at 348. These

policies cannot be vindicated if the units must be Board certified in advance.

The rules applying to accretion are not transferrable to the construction industry. This Court has insured the same protection of employee rights accomplished in the accretion cases by declaring in Higdon that pre-hire agreements are voidable prior to their maturing into collective bargaining agreements and by requiring a union to establish majority status before a collective bargaining agreement will be recognized. The opinion below seriously upsets the delicate balance established by Congress when it enacted Section 8(f). If the Board must determine in advance the bargaining unit in all pre-hire situations, the usefulness of pre-hire agreements will have been destroyed and the salutory goals that Congress sought to achieve will have been defeated.

III. Enforcement Of The Contract Against EMG Would Be Proper Even If It Could Not Be Enforced Against GPS.

The Court of Appeals held that the contract could not be enforced against EMG because it would improperly require EMG ". . . to make contributions with respect to GPS employees as though it were a single employer, which it is not." 653 F.2d at 977. This is an erroneous conclusion. The contract can readily be construed as requiring EMG to make payments into the funds as measured by the hours worked by GPS employees. Such an interpretation would give effect to the agreement between the parties without the necessity of finding that EMG and GPS are a single employer.

In *Walsh* v. *Schlecht*, 429 U.S. 401, 50 L.Ed. 2d 641, 97 S.Ct. 679 (1977) there was at issue a clause in a collective bargaining agreement that required an employer to contribute to a union employee-benefit fund at a rate of ninety-six cents per hour for carpentry work done by non-union workers employed by a subcontractor which was not itself a signatory of the

collective bargaining agreement. The Court enforced the agreement even though the sub-contractor's employees were not beneficiaries of the fund and even though the signatory employer had already paid those employees wages at the union scale plus an extra ninety-six cents per hour as a fringe benefit.

This Court pointed out in Walsh that a general rule of construction presumes the legality and enforceability of contracts, 429 U.S. at 408. That general rule ought to be applied to the present case. The Court of Appeals distinguished Walsh on the ground that it applied to a sub-contractor and that the sub-contractor situation is analogous to the alter-ego situation. This distinction is inappropriate. There was no contention in Walsh that the sub-contractor was an alter-ego of the general contractor. It was clearly a separate employer. Nor is the distinction between a sub-contractor and a related corporation important. The teaching of Walsh is that an employer-party to a collective bargaining agreement can be required under the agreement to pay into fringe benefit trust funds, sums measured by the hours worked by the employees of a connected non-union employer.

That is the situation here and Walsh governs. Regardless of the merits of the Sections 7 and 9 issues as applied to GPS, the policies set forth by the Court of Appeals in justification of its position do not apply to EMG. In accordance with the general rule of contract construction cited by this Court in Walsh, the agreement should be enforced against EMG.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

/s/ Joseph C. Segor

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of January, 1982, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Counsel for Respondents by depositing the same in the United States mail with first class postage prepaid and addressed to: Alan Bruckner, Esquire, 3604 Matheson Avenue, Coconut Grove, Florida, 33133.

/s/ Joseph C. Segor

Appendix

APPENDIX A

No. 80-5264.

United States Court of Appeals,
Fifth Circuit
Unit B

Aug. 17, 1981.

FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, FLORIDA MARBLE POLISHERS PENSION TRUST FUND, FLORIDA MARBLE POLISHERS HOLIDAY AND UNEMPLOYMENT TRUST FUND, AND FLORIDA MARBLE POLISHERS DISTRICT COUNCIL,

Plaintiffs-Appellants,

v.

EDWIN M. GREEN, INC., A FLORIDA CORPORATION, AND GREEN'S POOL SERVICE, INC., A FLORIDA CORPORATION,

Defendants-Appellees.

Appeal From The United States District Court For The Southern District Of Florida.

Before MILLER*, Judge, and FRANK M. JOHNSON, Jr., and THOMAS A. CLARK, Circuit Judges.

MILLER, Judge:

This appeal is from the judgment of the district court denying the motion by plaintiffs-appellants ("unions") for partial summary judgment and granting defendants-appellees' motion for summary judg-

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* Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

ment in an action brought under section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a).[1] We affirm.

Findings Of District Court[2]

Edwin M. Green, Inc. ("EMG") has been engaged in the swimming pool construction business since 1950. Edwin M. Green and his mother own 50% of the stock each, and since 1958 he has been its president. It has operated as a union shop. In 1965, Green's Pool Service, Inc. ("GPS") was organized by Edwin M. Green and engaged in swimming pool service and maintenance. As 98% owner, he became its president. It has operated primarily with nonunion labor. Both corporations operate in the South Florida area.

In 1971, due to the emergence of competing nonunion swimming pool construction companies, GPS entered the swimming pool construction business — this in addition to its service and maintenance activity. (In their brief, the unions assert that the objective of EMG and GPS was "to secure the largest possible portion of the construction market in the swimming pool business . . .," citing a page in the record below; however, as appellees point out, the cited record page discloses no evidence to support the assertion.) Some two years later, on August 15, 1973, Edwin M. Green, as President of EMG, executed a written collective bargaining agreement with the Florida Marble Polishers District Council as collective bargaining agent for and on behalf of its affiliated local unions). This agreement is the basis for the unions' claim against defendants-appellees, although the

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[1] 29 U.S.C. § 185(a) provides as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[2] While the district court properly took into account all of the facts and circumstances of the case, only those of substantial relevance to our decision are included herein.

unions never sought to organize GPS either before or after execution of the agreement. [3]

From 1956 until October of 1977, EMG was managed by Jack Eddington, its general superintendent. Following Eddington's retirement, Edwin M. Green assumed all managerial and executive duties until November of 1979, when a new superintendent, Kenneth Bishop, was appointed. From 1965 until March of 1974, GPS was managed by Charles Bromley, who left to accept a position with another firm. He returned in August of 1977 and resumed management until May of 1978, when he resigned for good. During Bromley's first absence and from May of 1978 until March of 1979, when G. P. Shivak was appointed general manager, Edwin M. Green took over the management. Thus, from May of 1978 until March of 1979, Edwin M. Green ran both corporations. However, when Eddington was with EMG, he was in "full charge " of all construction, labor relations, and day-to-day production activities, while Edwin M. Green functioned as financial head and was primarily occupied with sales, marketing, and administration; and, when Bromley was with GPS, he "possessed and exercised complete control over the operations . . . conferred with the sales force concerning marketing and sales, managed labor relations, including the setting of wage rates, hiring and firing, and all other conditions of employment," while Edwin M. Green was concerned with consultation on financial matters. There is no evidence suggesting that the two resignations of Bromley were motivated by anything other than his own personal reasons. Also, "there is no evidence suggesting that the business and policy decisions of the two corporate defendants were coordinated, or dependent upon each other in any way."

The posture of GPS, from its inception as a pool service and maintenance firm through its entry into the swimming pool construc-

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[3] The unions state that they were unaware, until 1978, that GPS was constructing swimming pools, but there is evidence that as early as June of 1974 the auditor for the Marble Polishers Union thought that GPS might be covered by a union contract with EMG; also, certain salesmen worked jointly for EMG and GPS.

tion business, "was based soley on business factors and was totally void of any underlying manifestations of union animus."

There has been some degree of overlapping of the operations of EMG and GPS. Thus, some employees of GPS have been employed by EMG at different times, but never jointly. Certain salespersons have been employed jointly. EMG purchases and warehouses some of the materials and supplies used by both corporations, but GPS pays EMG for the goods it uses. The parking area used by GPS is owned by EMG, but GPS pays rent for its parking privileges. On occasion they have leased equipment to each other. They share a common telephone number at one location for which expenses are shared. The record does not support a suggestion that payments of one corporation for goods and services chargeable to the other were at less than the fair market price.

To a much larger extent, the operations of EMG and GPS are separate. Each has its own physical location, materials, supplies, motor vehicles, and stationery. There is no commingling of funds, and each operates on its own capital without guaranteeing the performance of the other. Each maintains its own bank accounts, lines of credit, payroll accounts, billings, services, and insurance. They do not compete for the same jobs, nor have they ever worked on the same job site except in those limited situations where GPS subcontracted work to EMG. Union employees of EMG have not lost work, which they otherwise would have performed, to employees of GPS.

OPINION

The unions have premised their argument on two points: (1) that, in the circumstances of this case, the defendant corporations are a single employer under section 2(2) of the NLRA, 29 U.S.C. § 152(2), and both are bound by the terms of the collective bargaining agreement; *or* (2) regardless of the single employer issue, the defendant corporations are bound by the terms of the collective bargaining agreement[4]

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[4] Article XI, Interpretation of This Agreement, Section 4, provides:

> For the purpose of determining the responsibility and liability of the Employer under the terms of this Agreement, the word "Employer" as used throughout this Agreement is hereby defined to mean the firm

and have breached the agreement by failing to make the fringe benefit contributions and other payments to the plaintiffs-appellants in accordance with the agreement.[5] The unions make clear that the purpose of Article XI, Section 4, is to require the "Employer" to pay the fringe benefit contributions for hours worked by the nonunion business (here, GPS). The district court concluded, as a matter of law, that EMG and GPS are each separate, autonomous employer entities and are not a single employer, analyzing the facts from the standpoint of the factors of common ownership, interrelation of operations, common management, and centralized control of labor relations. *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965). The court did not comment on the unions' second point, although this was stressed in the unions' motion for reconsideration, which was summarily denied. The unions say that "the failure of the lower court to address this issue is a major reason for this appeal."

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described below, whether a sole proprietorship joint venture, or corporation; in addition, the word "Employer" shall at all times be defined to include any and all other business entities doing business in whole or in part in the trade and territorial jurisdiction of the District Court, including but not limited to a sole proprietorship, a partnership, a corporation, a joint venture, an assign, a successor, a subsidiary, a parent corporation, a merger, a lessee or a lessor, which are owned, controlled or operated by one or more of the members, stockholders, or officers, of the firm described below; or, in which one or more members, stockholders, or officers of such entity owns, controls or operates the firm described below. For the purpose of this definition, a person who will be deemed to "control or operate" a business entity if he is its managing or principal officer or member, or if he is in charge of its labor relations in whole or in part.

[5] Article III, Wages and Premiums, Section 7 provides in pertinent part as follows:

(A) HEALTH AND WELFARE

Commencing April 1, 1972, and weekly thereafter, the Employer agrees to contribute the sum of thirty cents (30¢) per hour to the FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, an existing common law Joint Trust Fund. On April 1, 1973, and continuing until a new Agreement is reached between the parties, the Health and Welfare contribution shall be forty cents (40¢) per hour.

* * * *

The district court's conclusion on the single employer issue was based on findings of fact warranted by the record, including a stipulation of the parties, a deposition of Edwin M. Green, an affidavit of Edwin M. Green, and an extract from a deposition of Dennis Murphy, business manager of Marble Polishers Local Union 12. These findings fully support the district court's conclusion. [6]

Comparison of the facts in this case with those in *Local 627, International Union of Operating Engineers* v. *NLRB*, 518 F.2d 1040 (D.C.Cir. 1975), *rev'd in part on unrelated issue sub nom. South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976), on which the unions heavily rely, clearly shows the relative weakness of the unions' position here on the single employer issue. Perhaps the most decisive difference is that the involved "double

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(C) PENSION

Commencing April 1, 1972, and weekly thereafter, the Employer agrees to contribute the sum of twenty-five cents (25¢) per hour to the FLORIDA MARBLE POLISHERS PENSION TRUST FUND, an existing common law Joint Trust Fund. On April 1, 1974, and continuing until a new Agreement is reached between the parties the Pension contribution shall be thirty cents (30¢) per hour.

(D) Contributions required to be paid . . . above are required to be paid for the duration of this Agreement and shall be paid on each hour worked by every employee working within the trade and territorial jurisdiction set forth in this Agreement. Contributions shall be made weekly to the Florida Marble Polishers Escrow Account in one check, accompanied with forms setting out information the Trustees deem necessary in the administration of the Joint Trusts.

[6] Even if it were established that EMG and GPS constituted a single employer, it would not necessarily follow that the employer-wide unit, which the contract would establish, is appropriate. *Local 627, Int'l Union of Operating Engineers* v. *NLRB*, 595 F.2d 844, 849 (D.C. Cir. 1979), *See, South Prairie Construction Co.* v. *Local 627, Int'l Union of Operating Engineers*, 425 F.2d 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976); *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 152-53, 61 S.Ct. 908, 912, 85 L.Ed. 1251 (1941).

breasted" operation[7] in *Operating Engineers* was established on or about February 25, 1972, when the involved collective bargaining agreement had been in effect since July of 1970 and was the third in a series of agreements commencing in 1960; whereas in this case, GPS entered the pool construction business some two years *before* the involved agreement between EMG and the unions.[8]

Under Article XI, Section 4 of the Agreement, it is clear that GPS is an "Employer," since Edwin M. Green is a stockholder (50%) of EMG, signatory to the Agreement, and owns 98% of the stock of GPS, and, further, since GPS is doing business in the trade and territorial jurisdiction of the District Council. As such, GPS has the "responsibility and liability" for recognition of the District Council[9] as provided in Article II, Section 1:

> The Employer recognizes the Council on behalf of its affiliated Local Unions as the collective bargaining agent of all

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[7] In general, double breasted units are formed in order to allow a contractor to compete for union and nonunion work. For example, a subcontractor may wish to operate one corporation that employs union workers and which, therefore, can bid for work from general contractors who let contracts only to unionized subcontractors. Simultaneously, the subcontractor may operate a nonunionized corporation which will bid on jobs let by general contractors who do not require unionized subcontractors. *Local 627, Int'l Union of Operating Engineers* v. *NLRB*, 595 F.2d at 845 n.1.

[8] The unions state that appellees "admit in their brief, GPS was set up as a non-union in order to avoid the terms and costs of the collective bargaining agreement that EMG operated under . . ." We find no such admission by appellees; indeed, such an admission would be anomalous considering that GPS was established as nonunion long before the involved collective bargaining agreement. The unions have also used this statement to bootstrap their argument of "union animus" on the part of EMG, which is contrary to the finding of "lack of union animus" by the district court.

[9] For purposes of this proceeding, we assume, without deciding, that the plaintiff trust funds have standing to maintain this action, along with the District Council. However, we note that the record contains letters from the Regional Director of the National Labor Relations Board ("NLRB") to appellees' counsel relating to a charge of unfair labor practice filed by GPS and EMG against the trust funds. The Regioal Director states that, after an investigation, he refuses to issue a complaint because the trust funds are not labor organizations within the meaning of section 2(5) of the NLRA.

> employees engaged in the work covered by this Agreement within the above territorial jurisdiction.

Thus, the parties to the agreement have undertaken, in effect, to usurp not only the GPS employees' right of self-determination under section 7 of the NLRA, 29 U.S.C. § 157, but also the authority of the NLRB under section 9(b), 29 U.S.C. § 159(b), to determine the appropriate bargaining unit for those employees. This they may not do. *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1357 (9th Cir. 1970); *NLRB* v. *Sunset House*, 415 F.2d 545 (9th Cir. 1969) (petition for enforcement granted for NLRB order denying applicability of collective bargaining agreement to accretion of employees of new store far removed from existing unit); *Welch Scientific Co.* v. *NLRB*, 340 F.2d 199 (2d Cir. 1965) (unfair labor practice for employer to apply agreement covering Chicago plants to employees in New York plant); *see NLRB* v. *Retail Clerks Local 588*, 587 F.2d 984, 986 (9th Cir. 1978) (since contract rights cannot exist independent of union's rights to represent the unit, new stores clause cannot bind new employees despite employers' acquiescence); *NLRB* v. *Vernitron Electrical Components, Inc., Beau Products Division*, 548 F.2d 24 (1st Cir. 1977) (unfair labor practice for employer to assist union in organizing its employees, and good faith no defense). *Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 788-89 (5th Cir. 1973) (unit always subject to NLRB's approval and is not finalized simply because arbitrator decided employer agreed to accretion in the contract); *Local 7-210, Oil, Chemical & Atomic Workers* v. *Union Tank Car Co.*, 475 F.2d 194, 199 (7th Cir. 1973) (contractual rights of union cannot exist separately and apart from union's right to represent the unit); *contra NLRB* v. *Appleton Electric Co.*, 296 F.2d 202 (7th Cir. 1961).

Enforcement of the agreement against GPS through a proceeding under section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), would not render the Agreement any less contrary to the Congressional policies underlying sections 7 and 9(b) of the NLRA. Enforcement of the agreement against EMG would improperly require it to make contributions with respect to GPS employees as though it were a single employer, which it is not. The unions cite several cases upholding union standards clauses in the

case of work subcontracted by the employer. [10] However, there is no issue in this case over subcontracting by EMG to GPS; and the subcontracting situation is, at most, analogous to the single employer or alter-ego situation, which is not present here.

In view of the foregoing, the judgment of the district court is AFFIRMED.

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[10] *Walsh* v. *Schlecht*, 429 U.S. 401, 408, 97 S.Ct. 679, 685, 50 L.Ed.2d 641 (1977) *Seymour* v. *Hull & Moreland Engineering*, 605 F.2d 1105 (9th Cir. 1979); *Construction Materials Trucking, Inc.*, 198 N.L.R.B. 1038, 81 LRRM 1109 (1972).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT* UNIT B

No. 80-5264

FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, *et al.*,
Plaintiffs-Appellants,

v.

EDWIN M. GREEN, INC., *et al.*,
Defendants-Appellees.

Appeal From The United States District Court For The Southern District Of Florida

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ON PETITION FOR REHEARING
(October 28, 1981)

Before MILLER,** FRANK M. JOHNSON, JR., and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The petition for rehearing is granted to the extent that the Court modifies its opinion by adding at the end of the third paragraph from the end of the opinion the following:

> That EMG and GPS were engaged primarily in the construction industry would not, under 29 U.S.C. § 158(f), make the agreement between EMG and the District Council applicable to GPS as a separate employer.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

** Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

In all other respects the petition for rehearing is ORDERED to be and hereby denied.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-4770-CIV-EBD

FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, *et al.*,

Plaintiffs,

v.

EDWIN M. GREEN, INC., a Fla. corporation, and GREEN'S POOL SERVICE INC., a Florida Corporation,

Defendants.

ORDER

THIS MATTER has come before the Court on Plaintiffs' Motion for Partial Summary Judgment and Defendants' Counter-Motion for Summary Judgment.

All parties agree that summary judgment is the proper procedure to resolve the dispositive issue in this case: Whether EDWIN M. GREEN INC., and GREEN'S POOL SERVICE INC., institute a single employer, thus binding GREEN'S POOL SERVICE INC., to the term of the collective bargaining agreement executed by EDWIN M. GREEN INC., with the Florida Marble Polishers District Council. The Parties have stipulated to an agreed set of facts and the Court has had the benefit of counsel's argument on the matter.

I. Background

The Defendant, EDWIN M. GREEN INC., (EMG) has been engaged in the commercial swimming pool construction business since 1950. Mr. Edwin M. Green has been its president since 1958. He and his mother are the sole owners of EMG, with each owning 50% of the company's stock. In 1965, the other corporate defendant, GREEN'S POOL SERVICE (GPS), was organized by Mr. Green. At the time of its formation, GPS engaged in pool service and maintenance work. Mr. Green, a 98% owner, became its first president.

From 1956 until October of 1977, EMG was managed by one Jack Eddington, the General Superintendent of the firm. Since Eddington's retirement in 1977, until the appointment of new superintendent, Kenneth Bishop, in November of 1979, Mr. Green assumed all the managerial and executive duties formerly performed by Mr. Eddington. This included the hiring and firing of its employees.

GPS was run by Charles Bromley from its inception until March of 1974 when Bromley left to accept a position with another firm. He again returned to GPS in August of 1977 and fully resumed his former duties until May of 1978, when he resigned for good. During Bromley's first absence and from May of 1978 until early 1979, when G. P. Chivak was appointed general manager, Mr. Green ran both companies. In March of 1979, Mr. Green resigned as president of GPS, although he is still president of EMG. During the two periods where Bromley's absence caused Mr. Green to assume control of GPS, he was necessarily in charge of its labor relations.

In 1971, due to the emergence of competing non-union commercial swimming pool construction companies, GPS entered the pool construction industry and primarily employed non-union labor. The construction was in addition to its pool maintenance service. EMG, on the other hand, employed union labor in its construction work. On August 15, 1973, Mr. Green, as president of EMG, executed a written collective bargaining agreement with the plaintiff, Florida Marble Polshers District Council. (District Council). It is by virtue of this agreement that Plaintiffs assert their claim: that the terms of the collective bargaining agreement are enforceable against GPS.

II. Single Entity Issue

At the outset, it must be noted that GPS had entered and had been actively engaged in the commercial swimming pool construction industry for over two years before plaintiff union entered into the collective bargaining agreement in question. Despite knowledge of GPA's activities, the District Council never once sought to organize GPS either before or after the execution of the collective bargaining agreement with EMG. Moreover, all parties agree that the posture of GPS, from the inception as a pool maintenance firm through its

emergence in the commercial pool construction industry, was based solely on business factors and was totally void of any underlying manifestations of union animus.

Indeed, the situation presented here is not the typical one where management attempts to undermine a collective bargaining agreement by shifting the emphasis of its work to a separate corporate entity not bound by a union contract. *See e.g. United Telegraph Workers, AFL-CIO* v. *N.L.R.B.*, 571 F.2d 665, 669-71 (D.C. Cir. 1978) (C.J. Bazelon, dissenting). The record clearly indicates that both EMG and GPS remain viable forces in the commercial pool construction industry.

The following chart sets forth the number of pools built by the respective companies during the relevant time frame:

	EMG	*GPS*
1968	100	
1969	117	
1970	79	
1971	44	54
1972	77	85
1973	77	57
1974	44	40
1975	8	26
1976	9	30
1977	8	45
1978	78	101

Thus, it is the interrelation between GPS and EMG, rather than any attempted subterfuge, upon which the plaintiffs base their claim.

A set of primary factors which must be considered in reaching a determination as to whether separate entities may constitute a single employer are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership. *Radio & Television Broadcast Technicians* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965); *Sakrete of Northern California Inc.*, 137 NLRB 1220, 56 LRRM 2329 (1962), *Aff'd* 332 F.2d 902 (9th Cir.), *cert. denied*, 379 U.S. 961 (1964). Emphasis is to be placed upon the first three factors. *Sakrete of Northern California Inc., supra*, 905 N.4.

A. Common Ownership

In examining these factors in order of their relative importance to the factual setting of this case, the common ownership issue must be dealt with first. It is not in dispute that Edwin M. Green, along with members of his immediate family, own substantially all of the stock of both EMG and GPS. However, common ownership by itself is insufficient to establish a single entity. *Milo Express, Inc.*, 212 NLRB 313, 86 LRRM 1726, (1974); *Drivers, Chauffeurs and Helpers Local No. 639*, 158 NLRB 1281 (1966). Therefore, inquiry must extend beyond the level of concurrent equity holdings.

B. Interrelations Of Operations

The degree to which the operations of two proportedly different entities are interrelated is very often indicative of whether they are in fact separate entities. The stipulated facts reveal that there is some degree of overlapping in the operations of GPS and EMG. Some employees of GPS have been employed by EMG at different times, but never jointly. At times, certain sales persons have been employed jointly by both companies. EMG purchases and warehouses some of the materials and supplies used by both of the Defendant corporations, however, GPS pays EMG for the goods which it uses. The parking area used by GPS is owned by EMG, but GPS pays rent for its parking privileges. The Defendant companies, on occasion, have leased equipment to each other and there has been some limited subcontracting between them. Additionally, the companies share a common telephone number in a neighboring county for which expenses are shared.

To a much larger extent, however, the operations of GPS and EMG remain separate and distinct. Each company has its own physical location, materials, supplies, vehicles, stationery and telephones. Furthermore, there is no commingling of funds, each company operates on its capital without guarantee of performance by the other; each maintains its own bank accounts, lines of credit, payroll accounts, billings and services; each has separate insurance policies and pays separate premiums.

EMG and GPS do not compete for the same jobs, nor have they ever worked on the same job site except in those limited situations where GPS sub-contracted work to EMG. In reality, each company operates within the ambit of a separate industry.

Although, it is difficult to draw a steadfast line which distinguishes union jobs from non-union jobs, economically one exists. Basically, GPS bids on these jobs which permit non-union labor on the site while EMG looks to union jobs for its construction contracts. This distinction is most important since the facts establish that union employees have not lost work, which they otherwise would have performed, to employees of GPS. *See United Constructors and Goodwin Construction Co.*, 233 NLRB 904, 97 LRRM 1131 (1977).

The Plaintiffs make no allegation, nor would the record support any conclusion which suggests that payments of one company, for goods or services chargeable to the other, were at less than the fair market price. Limited dealings between two firms having common ownership when done at fair market prices are not inconsistent with the separate entities concept. In *Gerace Construction Inc.*, 193 NLRB 645, 78 LRRM 1367 (1971), the Board was presented with a situation where there was common ownership of two construction companies. The two comanies shared a common bookkeeper, in addition to the common use of office space, tools and equipment although, rent was always paid. In holding that the two companies were separate entities, the Board found that there was an absence of lost business to the union company, along with sufficient separation of actual operational control. In so doing, the Board noted "the renting of tools and equipment appears to be common practice in the construction industry." *Id.* at 646. The Board has also upheld the separate existence of jointly owned construction companies where there has been limited sub-contracting between them. *United Constructors and Goodwin Construction Company*, 233 NLRB 904, 97 LRRM 1131 (1977).

C. Common Management

Edwin M. Green is the president, sales manager, general manager and purchasing agent for EMG. From October of 1977, until November of 1979, he also served as its superintendent. Prior to October of

1977, Jack Eddington was the general superintendent of EMG and was responsible for the attendant duties. These duties included full charge of all construction, labor relations and the day-to-day supervision of the actual production activities of the company. While Mr. Green was president of EMG during this period, Mr. Eddington was his chief assistant. Mr. Edwin Green functioned as financial head of EMG and was primarily occupied with sales, marketing and administration.

From its inception in 1965 through March, 1974 and from August, 1979 through May, 1978, Charles Bromley, as vice-president and general manager, possessed and exercised complete control over the operations of GPS. He conferred with the sales force concerning marketing and sales, managed labor relations, including the setting of wage rates, hiring and firing, and all other conditions of employment. He also contracted with sub-contractors, purchased materials and supervised the firm's day-to-day operation. Mr. Edwin M. Green's relationship with GPS during Bromley's tenure of employment was limited to consultation on financial matters, and more specifically, the state of accounts receivable. During these periods, Green's attention was concentrated on the construction company (EMG) rather than GPS.

In May, 1978, Bromley resigned frm GPS and Edwin Green assumed full control. He ran both companies from May, 1978 until the spring of 1979. In the spring of 1979, G. P. Shivak was appointed general manager of GPS. At the time of this appointment, Mr. Green left GPS, resigned as its president and went over full time to EMG. Since that date, Mr. Green's sole relationship with EPS concerns only its accounts receivable and sales.

The record does not indicate, nor is it even suggested, that any person other than Edwin M. Green ever served in a managerial capacity for both companies — either simultaneously or at different times after the formation of GPS in 1965. It is, however, evident that Edwin M. Green controlled and operated GPS from March, 1974 through August 1977, and from May, 1978 through April, 1979. Also, in addition to his other responsibilities with EMG, Mr. Green acted as its superintendent from October, 1977, until November,

1979. Thus, during the 11 month period from May, 1978 through April, 1979, Edwin M. Green was effectively running both companies. Furthermore, during the 3 1/2 year period between March, 1974 to August, 1977, Mr. Green was in charge of the day-to-day operations of GPS while also participating in the management of EMG. This participation in management was, however, limited in nature since Mr. Eddington was responsible for the daily operations. Both instances, where Edwin Green assumed active control of the day-to-day management of GPS, were brought about by the resignations of Charles Bromley. There is nothing in the present record which suggests that the two separate resignations of Mr. Bromley were motivated by anything other than his own personal reasons. Neither Mr. Green nor any other management personnel of GPS or EMG appears to have done anything to prompt the Bromley resignation. During these periods where Edwin Green was actively involved in the daily management of both companies, there is no evidence suggesting that the business and policy decisions of the two corporate defendants were coordinated, or dependent upon each other in any way. While the dual management role of Mr. Green is certainly a factor, *See, e.g., Radio and Television Broadcast Technicians* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965), the absence of any interdependence in the exercise of this function acts to militate against its consideration as a primary factor. *See Sakrete of Northern California, Inc.*, 127 NLRB 1220, 1228 (1962).

D. Centralized Control Of Labor Relations

"A critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations." *Gerace Construction Inc.*, and *Helger Construction Company, Inc.*, 193 NLRB 645, 78 LRRM 1367 (1971). The manner in which labor relations were handled by the two corporate defendants during the relevant time frame is stipulated. At the time the collective bargaining agreement was signed, until his retirement in October, 1977, Jack Eddington, as general superintendent, was in full charge of the labor relations of EMG. This included the power to hire and fire employees. Since October, 1977, Edwin M. Green controlled and operated EMG and was in charge of its labor relations, including the hiring and firing of its employees.

Mr. Charles Bromley, as vice-president and general manager of GPS, had complete management control during the periods of his employment. This included both office and site personnel. He had exclusive control of the labor relations of GPS, including the setting of wage rates, hiring and firing all other conditions of employment.

With specific regard to labor relations, GPS operated completely and autonomously under Bromley's control while he was general manager. EMG operated completely and autonomously under Eddington's control as long as Eddington remained with EMG. The only period in which Edwin M. Green was simultaneously in charge of the labor relations of both companies was the 11 month period brought about by Bromley's final resignation.

Notwithstanding this interlude where the labor relations of both firms were controlled by Mr. Green, there is still insufficient evidence to demonstrate that a community of interests existed between EMG and GPS in order to warrant their characterization as a single employer unit. In *Milo Express, Inc.*, and *Keystone Lawrence Transfer Company*, 212 NLRB 313, 86 LRRM 1726 (1979), the Board was presented with a situation where a common ownership and common control of labor relations vested in a single person. In a subsequent case, the Board depicted *Milo* in the following manner.

> *Milo* involved two commonly owned trucking companies. The Board concluded that the two operations were not a single integrated business enterprise. Significantly, one of the companies operated non-union and the other union. Thus, although the common owner participated in the labor relations of both companies, the personnel and labor relations policies of the respective enterprise were obviously distinct.

Numrick Arms Corp., 237 NLRB No. 32, 98 LRRM 1541, 1543 N.8 (1978).

The degree to which the labor relations policies of two commonly owned companies demonstrates some sort of dependence on each other is a crucial element in determining whether they constitute a single entity. In dismissing the union's complaint, the Board in *Milo* stated:

> "We do not view the evidence of common ownership and President Milo's participation in the labor relations of Milo Express

> as warranting a finding that Milo Express and Keystone constituted a single enterprise . . . Despite common ownership, the two businesses were not interdependent."

212 NLRB at 314

Similarly, the Board made these findings in *Sakrete of Northern California, Inc., supra,* where they refused to apply the "single entity" theory.

> Nothing in the present record, further, suggests that Avril's policy determinations, with respect to Sakrete, Inc., and the Respondent firm are coordinated, or dependent upon each other in any way. No common policy — with respect to wages, work schedules, fringe benefits of the employment relationship, or conditions of work — has been conceded.

1220 NLRB at 1228.

While there has been some common control of the labor relations of GPS and EMG, there has been absolutely no showing of a coordinated application of these policies. In this regard, the two firms have remained distinct and separate.

III. Conclusion

The fashion in which GPS and EMG conduct their operations demonstrates a sufficient degree of autonomy in order to preserve their integrity as separate entities. The time pattern in which this dispute arose, the lack of union animus, the lack of a coordinated or dependent scheme between the two companies, the fact that no employees of the union company have lost work to the non-union firm, and the degree of division in the operations of GPS and EMG all support a conclusion that the two do not exist as a single entity. Therefore, it is

ORDERED and ADJUDGED that the Plaintiff's Motion for Partial Summary Judgment is denied. It is further

ORDERED and ADJUDGED that Defendant's Motion for Summary Judgment is granted.

DONE and ORDERED this 28th of February, 1980.

/s/ _____EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

Copies Furnished To:
Howard S. Susskind, Esq.
Alan A. Bruckner, Esq.

APPENDIX D

COLLECTIVE BARGAINING AGREEMENT, ARTICLE XI, SECTION 4

Article XI
Interpretation Of This Agreement

Section 4. For the purpose of determining the responsibility and liability of the Employer under the terms of this Agreement, the word "Employer" as used throughout this Agreement is hereby defined to mean the firm described below, whether a sole proprietorship, joint venture, or corporation; in addition, the word "Employer" shall at all times be defined to include any and all other business entities doing business in whole or in part in the trade and territorial jurisdiction of the District Council, including but not limited to a sole proprietorship, a partnership, a corporation, a joint venture, an assign, a successor, a subsidiary, a parent corporation, a merger, a lessee or a lessor, which are owned, controlled or operated by one of more of the members, stockholders or officers, of the firm described below; or, in which one or more members, stockholders, or officers of such entity owns, controls or operates the firm described below. For the purpose of this definition, a person will be deemed to "control or operate" a business entity if he is its managing or principal officer or member, or if he is in charge of its labor relations in whole or in part.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-4770-Civ-WMH

FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, *et al.*,

Plaintiffs,

v.

EDWIN M. GREEN, etc., *et al.*,

Defendants.

PRE-TRIAL STIPULATION
NON-JURY TRIAL

The parties hereby file their Pre-Trial Stipulation as follows:

1. This is an action brought by the Florida Marble Polishers District Council, a labor organization, and the various Florida Marble Polishers Fringe Benefit Trust Funds, to enforce the terms of a collective bargaining agreement executed by Edwin M. Green, Inc., against Edwin M. Green, Inc. and Green's Pool Service, Inc. alleging that Green's Pool Service, Inc. is bound to the collective bargaining agreement and for the collection of health and welfare, pension and vacation benefits and check-off on behalf of certain employees covered by a collective bargaining agreement.

2. The basis of federal jurisdiction is found in 29 U.S.C. § 185.

3. The pleadings raising the issues are Plaintiffs' Complaint and the Answers and Affirmative Defenses of the Defendants.

4. The following motions are before the Court:

(a) Plaintiffs' Motion for Partial Summary Judgment.

(b) Defendants' Motion for Summary Judgment.

(c) Plaintiffs' Motion to Compel Discovery.

5. Stipulated facts:

(a) Plaintiff, Florida Marble Polishers District Council, is a labor organization, and has standing to bring this action.

(b) Plaintiffs, Florida Marble Polishers Health and Welfare Trust Fund, Florida Marble Polishers Pension Trust Fund, and Florida Marble Polishers Holiday & Unemployment Trust Fund, are third-party beneficiaries of the collective bargaining agreement and have standing to bring this action.

> Defendants object to this contention and state that the Trust Funds have no standing under 29 U.S.C. § 185, as they are not "labor organizations."

(c) The Defendants are engaged in an industry affecting commerce within the meaning of the Act in, among other counties, Dade County.

(d) Edwin M. Green, Inc. has been engaged in the business of building swimming pools since 1950.

(e) Edwin M. Green has been president of Edwin M. Green, Inc. since 1958.

(f) Edwin M. Green and his mother are equal co-owners of the stock of Edwin M. Green, Inc. since 1976.

(g) Edwin M. Green is the sales manager, general manager, superintendent and purchasing agent for Edwin M. Green, Inc. Until 1977, Jack Eddington exercised the typical duties of the usual general superintendent for Edwin M. Green, Inc., being in full charge of all construction, labor relations, including the power to hire and fire, and the day-to-day supervision of the actual production activities of the company. *Bishop supra* in 1979.

(h) Since October, 1977, Edwin M. Green controlled and operated Edwin M. Green, Inc. and was in charge of its labor relations, including the hiring and firing of its employees.

(i) Edwin M. Green, Inc. has employed tile setters and tile helpers.

(j) On August 15, 1973, Edwin M. Green, as president of Edwin M. Green, Inc., executed a written collective bargaining agreement with the Florida Marble Polishers District Council.

(k) Green's Pool Service, Inc. was incorporated in Florida in 1965 for the purpose of doing pool service and maintenance work, which the corporation solely performed until 1971.

(l) Since 1971 Green's Pool Service, Inc. is a corporation engaged in constructing swimming pools, doing business in Dade County, Florida.

(m) Edwin M. Green was elected president, Charles Bromley was elected vice-president and Mary Shaw, secretary-treasurer of Green's Pool Service, Inc. Bromley was also appointed general manager. (in 1965).

(n) Bromley had worked for Edwin M. Green, Inc. as a salesman in the late 1950's and upon his severance from Edwin M. Green, Inc. worked in and around the pool construction business until the formation of Green's Pool Service, Inc. Bromley was the qualifier for Green's Pool Service, Inc.

(o) Edwin M. Green was the president of Green's Pool Service, Inc. from its inception until March, 1979.

(p) As vice-president and general manager, Bromley possessed and exercised complete control over the operations of Green's Pool Service, Inc. since its inception since 1965. Bromley conferred with the sales force, concerning marketing and sales, managed the work force, including office and outside, and completely managed labor relations, including the setting of wage rates, hiring and firing and all other conditions of employment. He contracted with subcontractors, purchased materials and supervised the firm's day-to-day operation.

(q) While Green was president of Edwin M. Green, Inc. his chief assistant and general superintendent was Jack Eddington, who worked for Edwin M. Green, Inc. since 1956.

(r) Edwin M. Green functioned as financial head of Edwin M. Green, Inc. primarily occupied with sales, marketing and administration.

(s) With specific regard to labor relations, Green's Pool Service operated completely and autonomously under Bromley's control while he was general manager. Edwin M. Green, Inc. operated completely and autonomously under Eddington's control, as long as Eddington remained with Edwin M. Green, Inc.

(t) Edwin M. Green's relationship with Green's Pool Service, Inc. during Bromley's tenure was limited to consultation on financial matters, and more specifically the state of accounts receivable. Green's attention was concentrated on the construction company (Edwin M. Green, Inc.), rather than Green's Pool Service, Inc.

(u) Mary H. Shaw, an officer of Edwin M. Green, Inc., is also a corporate officer of Green's Pools Service, Inc.

(v) Since resigning as president of Green's Pool Service, Inc., Edwin M. Green has been involved with the sales and accounts receivable.

(w) Ninety-eight (98%) percent of the stock of Green's Pool Service, Inc. is owned by Edwin M. Green.

(x) As chief stockholder, Edwin M. Green was consulted as to decisions made with respect to the operation and management of Green's Pool Service, Inc. with regard to major policy decisions.

(y) Since it has become involved in the construction of swimming pools, Green's Pool Service, Inc. has employed persons and performed work generally within the trade and territorial jurisdiction of the collective bargaining agreement.

(z) Edwin M. Green, during March, 1974 through August, 1977, and May, 1978 through April, 1979, controlled and operated Green's Pool Service, Inc. and was in charge of its labor relations, including the hiring and firing of its employees.

(aa) Some of the construction employees of Green's Pool Service, Inc. have been employed by Edwin M. Green, Inc. at different times, both companies have employed the services of certain sales persons jointly.

(bb) Edwin M. Green, Inc. and Green's Pool Service, Inc. have separate buildings on adjoining lots and use a common parking area for which Green's Pool Service, Inc. pays rent.

(cc) The Defendants' companies, on occasions, have used the same equipment for which rent has been paid. Additionally, the companies share a common telephone number in Broward County, for which expenses are shared.

(dd) Edwin M. Green, Inc. warehouses and purchases some of the materials and supplies used by both of the Defendant corporations. GPS purchases certain materials and supplies as needed from EMG.

(ee) The Defendant corporations utilize the same insurance agency and bank, but have separate policies, premiums, accounts, billings and services.

(ff) Edwin M. Green, Inc. and Green's Pool Service, Inc. use the same accounting firm, payroll clerk and legal counsel, but have separate accounts, billings and services.

(gg) Edwin M. Green has possession and custody of the financial statement of both of the Defendant businesses.

(hh) In October of 1977, Eddington retired from Edwin M. Green, Inc. and Edwin M. Green took over all of his duties at Edwin M. Green, Inc.

(ii) In May, 1978, Bromley resigned from Green's Pool Service, Inc. and Edwin M. Green took control of Green's Pool Service, running both companies from May of 1978 until spring of 1979.

(jj) In the spring of 1979, G.P. Shivak was appointed general manager of Green's Pool Service, Inc. at which time Edwin M. Green left Green's Pool Service, Inc., resigned as president, and went over full time to Edwin M. Green, Inc.

(kk) Since that time, Edwin M. Green has taken over at Edwin M. Green, Inc. and is performing all the duties previously performed by Eddington, while Shivak is acting in the same capacity at Green's Pool Service, Inc.

(ll) Since that date, Green's sole relationship with Green's Pool Service, Inc. is concerned with its accounts receivable and billings.

(mm) No employees of GPS have received benefits as result of employment with GPS.

6. Facts, though not admitted, not to be contested at trial: none.

7. Issues of fact which remain to be litigated at trial.

(a) Whether the Defendants, Edwin M. Green, Inc. and Green's Pool Service, Inc. are so organized and controlled and their businesses conducted in such a manner as to make them merely agencies, instrumentalities, adjuncts or alter egos of one another.

(b) Whether the Defendants, Edwin M. Green, Inc. and Green's Pool Service, Inc. are so organized and controlled and their businesses conducted in such a manner as to make them a single employer within the meaning of Article X, Section 4 of the collective bargaining agreement.

(c) Whether Green's Pool Service, Inc. is bound by said collective bargaining agreement.

(d) Whether Edwin M. Green's resignation as president of Green's Pool Service, Inc. was prompted by the filing of the instant lawsuit.

8. Agreed issues of law:

(a) The Court has jurisdiction of the parties and subject matter of this lawsuit.

Defendants object to the jurisdiction of the Court as it relates to the Plaintiff-Trust Funds as not being "labor organizations" within the meaning of the Act.

9. Issues of law for determination by the Court:

(a) As a matter of law, can the collective bargaining agreement, executed by Edwin M. Green, Inc., be extended to cover Green's Pool Service, Inc.

(b) If Plaintiffs are successful, are they entitled to recover reasonable attorneys' fees and accountants' fees.

(c) Assuming Plaintiffs are successful, can Plaintiffs recover, as damages, contributions for health and welfare, pension and holiday benefits as a matter of law.

Plaintiffs object to this as an issue of law since the collective bargaining agreement clearly provides that fringe benefit contributions are to be paid on behalf of employees performing work within the trade and geographic jurisdiction of the Florida Marble Polishers District Council.

(d) Whether the Plaintiffs' claim is barred by any of the Defendants' affirmative defenses.

10. List of trial exhibits. The list of trial exhibits are set forth on separate schedules attached to the Stipulation.

11. List of trial witnesses. The list of trial witnesses are set forth on separate schedules attached to the Stipulation.

12. Estimated trial time. Three (3) days.

13. Attorneys' fees. Plaintiffs are unable to estimate the maximum amount of attorneys' fees allowable through trial. Should the Court find that Plaintiffs are entitled to their attorneys' fees, then the Court may set the same on the Affidavit of the Plaintiffs' attorneys and accountants as to the hours expended and the rate per hour, with a statement that such fees are reasonable for like services in the community, or, in the alternative, schedule a separate hearing, post-trial, concerning the amount of attorneys' fees and accountants' fees.

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Tel. (305) 325-1661

By _____
HOWARD S. SUSSKIND
Howard S. Susskind
DATED: _____

LAW OFFICES ALAN A. BRUCKNER
Attorney for Defendants
Suite 1016, Ingraham Building
25 S.E. Second Avenue
Miami, Florida 33131
Te. (305) 358-0000

By _____
ALAN A. BRUCKNER
Alan A. Bruckner
DATED: _____

10. *Plaintiffs' List of Trial Exhibits*

The following documents for the period September 20, 1973 to the present for the Defendants:

(a) Employer's Quarterly Tax Return, IRS Form 941

(b) State Unemployment Compensation Form UCT #6

(c) Payroll Journal, Disbursements Journal, Payroll Subsidiaries, General Ledger.

(d) Time and job record cards.

(e) Listing or schedule of subcontractors

(f) Cash receipts journal

(g) Cancelled checks

(h) Copies of all invoices for purchases of materials, supplies and equipment rentals

(i) Copies of all invoices to customers and clients

(j) Copies of all purchase orders

(k) Copies of all leases and/or rental agreements

(l) Certificate of registration on ownership of any motor vehicles or equipment

(m) Copies of all financial statements

(n) Job costs records for each pool constructed by the Defendant, Green's Pool Service, Inc., from January 1, 1975 to the present.

(o) Time records for each pool constructed by the Defendant, Green's Pool Service, Inc., from January 1, 1975 to the present.

(p) Collective bargaining agreement attached as Exhibit A.

(q) Any and all fringe benefit contribution report filed by the Defendant, Edwin M. Green, Inc.

(r) Agreements and Declarations of Trust for the Florida Marble Polishers Health and Welfare, Pension and Holiday Trust Funds

(s) Plans of the Florida Marble Polishers Health and Welfare, Pension and Holiday Trust Funds

(t) Any and all exhibits contained in the Defendants' exhibit list.

11. *Plaintiffs' List of Trial Witnesses*

(a) Dennis Murphy and/or other representative
of the Florida Marble Polishers District Council
1772 N.W. 1st Avenue
Miami, Florida

(b) Donald Mariutto and/or other Trustees of
the various Florida Marble Polishers
Fringe Benefit Trust Funds
4573 Ponce de Leon Bldv.
Coral Gables, Florida

(c) Harold L. Schwartz, C.P.A. and/or other
employee of the firm of Schwartz & Rabin, P.A.
8966 S.W. 87th Court, Suite 28
Miami, Florida

(d) Joseph Mastrangelo and/or other employee of
Florida Administrators, Inc.
7300 North Kendall Drive
Miami, Florida

(e) Edwin M. Green

(f) Any and all employees of the Defendants

(g) Impeachment and rebuttal witnesses

(h) Any and all witnesses listed by the Defendants.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-4770-Civ-WMH

FLORIDA MARBLE POLISHERS HEALTH AND WELFARE TRUST FUND, *et al.*,

Plaintiffs,

v.

EDWIN M. GREEN, etc., *et al.*,

Defendants.

AGREED MODIFICATIONS TO PRE-TRIAL STIPULATION AS OF MONDAY, JANUARY 28, 1980

The following paragraphs, per conversation this date with Mr. Susskind, have been agreed to be submitted in place of or added to Mr. Susskind's Pre-Trial Stipulation as submitted:

(g) Edwin M. Green is the sales manager, general manager, superintendent (*until about November, 1979, at which time a new superintendent, Kenneth Bishop, was hired*)[1] and purchasing agent for Edwin M. Green, Inc. Until 1977, Jack Eddington exercised the typical duties of the usual general superintendent for Edwin M. Green, Inc., being in full charge of all construction, labor relations, including the power to hire and fire, and the day-to-day supervision of the actual production activities of the company, including personnel

(k) Green's Pool Service, Inc. was incorporated in Florida in 1965 fo rthe purpose of doing *pool* service and maintenance work, which

(m) Edwin M. Green was elected president, Charles Bromley was elected vice-president and Mary Shaw, secretary-treasurer of Green's Pool Service, Inc. Bromley was also appointed general manager, *this is 1965*.

---

[1] All changes or additions are underscored.

(n) Bromley had worked for Edwin M. Green, Inc. as a salesman in the late 1950's and upon *his* severance from Edwin M. Green, worked in and around the pool construction business until the formation of Green's Pool Service, Inc. *Green's Pool Service, Inc., qualified under Bromley's certificate of competency issued to him by the appropriate State Board of Florida.*

(p) As vice-president and general manager, Bromley possessed and exercised complete control over the operations of Green's Pool Service, Inc. *since its inception in 1965.* Bromley conferred with the sales force, concerning marketing and sales, managed the work force, including office and outside, and completely managed labor relations, including the setting of wage rates, hiring and firing and all other conditions of employment. He contracted with subcontractors, purchased materials and supervised the firm's day-to-day operation.

(x) As chief stockbroker, Edwin M. Green was consulted as to *major policy* decisions made with respect to the operation and management of Green's Pool Service, Inc.

(aa) *Some employees of Green's Pool Service, Inc. have been employed by Edwin M. Green, Inc., at different times, but not jointly; certain sales persons have been employed jointly by both companies.*

(dd) Edwin M. Green, Inc., warehouses and purchases some of the materials and supplies used by both of the Defendant corporations; *Green's Pool Service, Inc. purchased certain materials and supplies as needed from Edwin M. Green, Inc.*

(jj) In the spring of 1979, G.P. Shivak was appointed general manager of Green's Pool Service, Inc., at which time Edwin M. Green left Green's Pool Service, Inc., resigned as president, and went over full time to Edwin M. Green, Inc.

(kk) Since that time, Edwin M. Green has taken over at Edwin M. Green, Inc. and is performing all the duties previously performed by Eddington, while Shivak is acting in the same capacity at Green's Pool Service, Inc.

(jj) *No employee of Green's Pool Service, Inc. has ever received any benefits from any of the Plaintiff trust funds as a result of having been employed at Green's Pool Service, Inc.; Green's Pool Service, Inc. has never made any contributions on their behalf when they were so employed by Green's Pool Service, Inc.*

Addition:

12. *Defendants' List of Trial Witnesses*

Any and all witnesses listed by the Defendants, including any and all present and former employees of Green's Pool Service, Inc. and Edwin M. Green, Inc.

Respectfully submitted this 28th day of January, 1980.

ALAN A. BRUCKNER, P.A.
Attorneys for Defendants Edwin M. Green, Inc, and Green's Pool Service, Inc.

/s/ By ALAN A. BRUCKNER
Alan A. Bruckner

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy hereof was caused to be furnished via United States Mail this 28th day of January, 1986, to the following:

HOWARD S. SUSSKIND, ESQUIRE
KAPLAN, SICKING, HESSEN, SUGARMAN
ROSENTHAL & DE CASTRO, P.A.
P.O. Drawer 520337
Miami, Florida 33152

/s/ _____ALAN A. BRUCKNER

APPENDIX G

1. Section 7, 29 U.S.C. § 157

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

APPENDIX G

2. Section 8(f) 29 U.S.C. § 158(f)

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specified minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*

APPENDIX G

3. Sections 9(a) & (b), 29 U.S.C. §§ 159(a) & (b)

REPRESENTATIVES AND ELECTIONS

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at anytime to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Opposition

NO. 81-1393

in the Supreme Court of the United States

October Term, 1981

Florida Marble Polishers Health and Welfare Trust Fund, Florida Marble Polishers Pension Trust Fund, Florida Marble Polishers Holiday and Unemployment Trust Fund and Florida Marble Polishers District Council,
Petitioners,

vs.

Edwin M. Green, Inc., a Florida Corporation and Green's Pool Service, Inc., a Florida Corporation,
Respondents.

OPPOSING BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether enforcement of a provision in a construction industry collective bargaining agreement that includes within its definition of employer, any and all other business entities doing business in whole or in part in the trade and territorial jurisdiction of the union, included but not limited to a sole proprietorship, a partnership, a corporation, a joint venture, an assign, a successor, a subsidiary, a parent corporation, a merger, a lessee or a lessor, which are owned, controlled or operated by one or more of the members, stockholders or officers, of the firm which is signatory to the contract, or in which one or more members, stockholders, or officers of such entity owns, controls or operates the firm signatory to the contract, and for the purposes of this definition, a person will be deemed to "control or operate" a business entity if he is its managing partner or principal officer or member, or if he is in charge of its labor relations in whole or in part, can be proper against a separate and distinct employer, who is not a subcontractor of the firm signatory to the collective bargaining agreement and is not a single employer with it, or does enforcement against the second employer usurp the employee's right of self-determination under section 7 of the National Labor Relations Act (29 U.S.C. §157) and does enforcement usurp the authority of the NLRB to determine the appropriate bargaining unit for those employees, under section 9(b) of the National Labor Relations Act, 29 U.S.C. §159(b).

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Respondents.

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Edwin M. Green, Inc., and Green's Pool Service, Inc., Respondents herein, respectfully oppose the Writ of Certiorari which Petitioners ask be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered August 17, 1981, as modified on Petition For Rehearing on October 28, 1981.

RESPONDENTS' ADDITIONS TO THE STATEMENT OF THE CASE

In his capacity as President of EMG, Green executed the Collective Bargaining Contract with the Florida Marble Polishers District Council *on August 15, 1973.*

But, GPS was organized in 1965 and engaged in swimming pool service and maintenance. It entered the swimming pool construction business (the same business as engaged in by EMG) in 1971, two full years before EMG signed the Union contract. This pool construction business was in addition to its service and maintenance activities, which it continued to perform.

The Union never sought to organize GPS, either before or after the execution of the Union agreement by EMG. Although there is evidence that as early as June of 1974, the auditor for the Marble Polishers Fund thought that GPS might be covered by a Union contract with EMG, and certain salesmen worked jointly for EMG and GPS.

Furthermore, the following number of pools were built by the respective companies during the relevant time frame:

	EMG	GPS
1971	44	54
1972	77	85
1973	77	57
1974	44	40
1975	8	26
1976	9	30
1977	8	45
1978	78	101

THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

Respondent submits that Petitioners have not cited any grounds for granting a review on the Writ of Certiorari. No Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals in the same matter, or has decided a Federal question in a way in conflict with a state Court of Last Resort, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Neither has a Federal Court of Appeals decided an important question of Federal Law which has not been, but should be, settled by this Court, or has decided a Federal question in a way in conflict with the applicable decisions of this Court.

I. The Court of Appeals has Decided the Issue.

The Fifth Circuit Court of Appeals answered Petitioners' arguments by holding:

> "That EMG and GPS were engaged primarily in the construction industry would not, under 29 U.S.C. §158(f), make the agreement between EMG and the District Council applicable to GPS as a separate employer."

Thus, Petitioners, by abandoning their contention below that EMG and GPS were a single employer[1] tolls the death knell for their argument.

This is so because if the two are separate, as the District Court and the Circuit Court of Appeals found, then the cases do not show any justification for the application of the contract which EMG has signed, to GPS, as a *separate* employer.

Since EMG and GPS are two separate companies, the Court must be concerned that these factors "should be seen from the perspective of the employee." *NLRB vs. Security-Columbian Banknote Co.*, 541 F.2d 135, 139 (3rd Cir. 1976).

In order to give heed to this "employee viewpoint" the *Board* must give weight to factors relevant to finding an accretion and these include:

> ". . . integration of operations, centralization of managerial and administrative control and geographic proximity. Also relevant are similarity of working conditions, skills and functions, common control over labor relations, collective bargaining history and interchangability of employees. N.L.R.B. v. Sunset House, 415 F.2d 545, 548 (9th Cir. 1969); Spartans Industries, Inc. v. N.L.R.B., 406 F.2d 1002, 1005

[1]"On appeal, the Court held that the record fully supported the findings and conclusions of the District Court that the two corporations were not a single employer. This ruling is not challenged in this Petition." (Page 6, Petitioners' Petition)

(5th Cir. 1969); The Great A & P Tea Co., 140 NLRB 1011, 1021 (1963)." *Security-Columbian Banknote Co.* at 140.

The Court noted that this is generally committed to the Board's informed discretion. *Security-Columbian Banknote Co.* at 140.

Moreover, many of these factors are exactly the same as those which the Circuit Court of Appeals considered, and rejected, in its findings that EMG and GPS did not constitute a single employer.

In like manner, *Sheraton-Kauai Corporation v. N.L.R.B.*, 429 F.2d 1352, 1355, (9th Cir. 1970) states that:

> "Absent a bargaining history in a more comprehensive unit or functional integration of sufficient degree to obliterate separate identity, the employees' 'fullest freedom' is maximized, we believe, by treating the employees in a single store or restaurant of a retail chain operation as normally constituting an appropriate unit for collective-bargaining purposes. (citing *Haag Drug Co.*, 169 NLRB 877 (1968) . . .
>
> "These rulings directly concerned unit determinations in connection with initial representation petitions. As the Board has noted, however, essentially the same factors are involved in determining whether employees at a subsequently established single location

should be absorbed into an existing multiple-location unit without their consent. In the latter situation, section 7 rights are even more clearly at stake. If the Board, in making its initial representation determination, decides that a multiple-location unit is appropriate, employees at each included single location have an opportunity to participate in the resolution of the representation issue. But if employees at a new single location are simply absorbed into the multiple-location unit by accretion, they are denied that opportunity. Nor does the procedure for decertification under section 9 of the Act provide an adequate remedy for these employees."

Even where there is a minimum of local independent control, prices are the same, banking and insurance coverage is the same, there is centralized control over labor relations, there are uniform employment applications, and employee training procedures, wages, hours, and working conditions are identical, the Board refused to allow the contract at one group of stores to accrete the employees at another store because

". . . employees are usually allowed to select their own bargining representatives and that the accretion doctrine should be applied restrictively as it offends this basic employee right." (*NLRB vs. Sunset House*, 415 F.2d 545, 547 (9th Cir. 1969)

II. The Board and the Courts Have Refused To Usurp Employee Rights.

The Court of Appeals for the 9th Circuit in *NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 986 (1978) held:

> "This [accreting a new store to the larger unit] of course, denies employees of a new store their freedom of choice, for an election is never held. New store employees are simply subsumed into the larger unit without anyone ascertaining whether they desire union representation, and if so, whether they desire to join the larger unit. The new store clauses were relied on to justify this practice.
>
> "The courts have frowned on this contractual usurpation of §7 rights. E.g., Boire v. Int'l Bro. of Teamsters, 479 F.2d, 778 (CA 5 1973). Since conract rights cannot exist independent of the union's right to represent the unit, the new stores clause cannot bind the new employees despite the employer's acquiescence. Local 7-210, Oil, Chemical and Atomic Workers v. Union Tank Car Co., 475 F.2d 194 (CA 7 1973), cert. denied, 414 U.S. 875, 94 S.Ct.68, 38 L.Ed.2d 120 (1973)
>
> "Board policy has been to deny efficacy to such clauses, and this court has explicitly approved this policy."

Finally, the Board has continued to adopt the same rationale, and *since* the handing down of the Supreme Court's case in *NLRB v. Local 103, International*

Association of Bridge, Structural and Ornamental Iron Workers (Higdon Construction Co.), 434 U.S. 335, 54 L.Ed. 2nd 586, 98 S.Ct. 651 (1978). Thus, in Malcolm Boring Co. Inc., the Board held that it was necessary, as a condition precedent, to find that a corporation, Bruce Malcolm, Inc., would be a single employer with another business entity, Malcolm Boring Co. Inc., in order to find that Bruce Malcolm, Inc. would be bound to the contract with Malcolm Boring Co. Inc. and the Operating Engineers. The Board, however, found that the two were not a single employer, and therefore Bruce Malcolm, Inc. was not bound to the contract.

There was, moreover, a third company involved, B.C. Malcolm. As to the third company, it found that it was a single employer with Malcolm Boring Co. Inc. Nevertheless, the Board found the employees of each to constitute a separate unit, because, in part, there was a three year practice of not applying the collective bargaining agreement with Malcolm Boring to the employees of B.C. Malcolm.

The contract with The Operating Engineers "began as a pre-hire agreement" and Malcolm Boring Co. Inc. was in the building and construction industry. *Malcolm Boring Co., Inc.*, 259 NLRB No. 81.

These are general principles, and not affected by Section 8(f) and exist quite apart from whether the agreement with EMG is voidable or not.

The 5th Circuit Court of Appeals knew exactly what it was doing when it held that Section 8(f) would not "make the agreement between EMG and the District Council applicable to GPS as a separate employer."

Were it otherwise, the Court of Appeals for the 5th Circuit could have relied upon *Baton Rouge Building and Construction Trades Council, u. E.C. Schafer Constr. Co.*, 657 F.2d 806 (5th Cir. 1981) which holds that Higdon's, *supra*, recognition of "the voidable nature" of prehire agreements meant:

> ". . . The prehire agreement attains the status of a collective bargaining agreement, that is, an enforceable contract, only upon a showing that the union enjoys majority support in the relevant bargaining units." (At 809)

Whether the 5th Circuit is right or wrong in their conclusion as to the holding of Higdon, is immaterial here, because they did not rely upon *Baton Rouge Building and Construction Trades Council u. E.C. Schafer Constr. Co.*

Petitioners cite not a single case to support their contention (at page 9 of Petitioners' Brief) that:

> "Certainly, Edwin M. Green, the President and ninety-eight percent owner of GPS could have bound it to the collective bargaining agreement."

Certainly, Edwin M. Green could have bound EMG to the contract, but had he attempted to bind GPS to it, he would have usurped the GPS employees' right of self-determination under Section 7. It is for that reason that Higdon does not apply to GPS because there is no contract, prehire or otherwise, which applies to GPS, because GPS and EMG are separate employers.

III. The Question Remains As To Whether the National Labor Relations Board Would Find Two Appropriate Units Here.

Even if the 5th Circuit had found GPS and EMG to be a single employer, there still remains the question of whether the employees of both of them form different units. The Petitioners state that the contracting parties may define the relevant bargaining unit without seeking approval of the NLRB. But there must be agreement of both parties to the contract for that to be so. Here, at the time of the signing of the contract with the Union, EMG was managed by one Jack Eddington and he remained so until 1977. GPS was run by one Charles Bromley from its inception until March of 1974. Green, on August 15, 1973, as president of EMG, executed a written collective bargaining agreement with the District Council. The Petitioners, however, concede that they do not attack the separateness of the two corporations here. Accordingly, it is difficult to understand what they mean when they say the contracting parties may define the relevant bargaining unit without seeking approval of the NLRB.

In its brief (page 10) the Petitioners cite *NLRB vs. J. Collins Sons, Inc.*, 332 F.2d 523 (7th Cir. 1964). In the *Collins* case, there was a Stipulation For Certification Upon Consent, and the stipulation had to be approved by the Board. The Court simply did not go along with the Board actions in that case. But that is the function of the Circuit Courts. Here, the Union and GPS did not enter into any kind of agreement to have the unit as defined here apply to the two of them, much less enter into a Stipulation For Certification Upon Consent Election.

In like manner, *Douds v. International Longshoremen's Association*, 241 F.2d 278 (2nd Cir. 1957) did not involve the application of the agreed-upon unit to *two* employers, one of whom never consented to it.

Moreover as can be seen from Respondent's Additions To The Statement of the Case, (page 2) and from the Appendix C (page 14a, Petitioners' Brief) for the years from 1971 to 1978, with two years' exception, GPS had a larger unit than did EMG, thus precluding the assumption of a larger unit into a smaller one.

Indeed, the GPS employees engage in swimming pool service and maintenance, in addition to the swimming pool construction which EMG engages in, which would militate against including them in the same unit as EMG employees.

IV. There Is No Subcontractor Of EMG To Which the Contract Can Apply.

At page 12 of their Brief, Petitioners state that:

> "The contract can readily be construed as requiring EMG to make payments into the funds as measured by the hours worked by GPS employees. Such an interpretation would give effect to the agreement between the parties without the necessity of finding that EMG and GPS are a single employer."

Petitioners then discuss *Walsh v. Schlecht*, 429 U.S. 401, 50 L.Ed.2d 641, 97 S.Ct. 679 (1977). The 5th Circuit Court of Appeals noted that the Petitioners had cited Walsh to it, too. They pointed out that there

was "no issue in this case over sub-contracting by EMG to GPS; and the sub-contracting is, at most, analagous to the single employer or alter-ego situation, which is not present here."

Walsh dealt with a sub-contractor, someone who does the *work of* the contractor himself. Here, the 5th Circuit Court of Appeals held that:

> "They do not compete for the same jobs, nor have they ever worked on the same job site except in those limited situations where *GPS sub-contracted work to EMG.* Union employees of EMG have not lost work, which they otherwise would have performed, to employees of GPS." (Appendix, page 4a)

It is thus easy to see why the 5th Circuit would so readily dismiss the argument concerning Walsh.

V. The Contract Is Not a Pre-hire Contract As To GPS.

Petitioner states (at page 8 of its brief) that:

> "Although it is a completed collective bargaining agreement as to EMG, the present agreement is a 'pre-hire' agreement as to GPS."

It is unknown where Petitioner gets this notion. Indeed, if it is not a pre-hire to EMG, neither is it a pre-hire contract as to GPS. GPS has a stable contingent of employees, and has been operating in the Miami area for several years, labor costs of both corporations

are known to the management of each, and there is an adequate supply of employees for both corporations.

VI. There Has Been a Repudiation Of the Contract As to GPS, In Any Event.

Even if it could be said that the Petitioners' arguments concerning the application of the contract to GPS are accurate, there has been a repudiation. The action of Edwin M. Green in signing the contract for EMG while GPS was under the direction of another, and that two years after GPS had entered into the pool construction business, coupled with the Union's refusal since 1974 to attempt to bring GPS into the contract picture either before or after the execution of the agreement, and finally the fact that EMG and GPS are separate employers, constitutes a repudiation of the contract as to GPS. That repudiation took place upon the date of signing the contract with EMG, i.e. August 15, 1973.

This is assuming that a repudiation was in fact necessary. *Todd v. Jim McNeff Inc.*, 667 F.2d 800, 803 (9th Cir., 1982).

Finally, the cases cited by Petitioners to the effect that the bargaining unit does not have to be decided by the Board in every instance, assumes a bargaining relationship, which does not exist here between GPS and the petitioning Union. GPS, having been found to be a separate employer, in no manner is obligated to bargain with the Union.

VII. The General Law Of Contracts Precludes the Application of the Contract To GPS.

To find that this contract would bind another, separate, employer appears to be contrary to the basics of contract law. There is no consideration running to GPS, no mutual assent, no meeting of the minds. "The Courts have stressed the classic concept of the agreement resulting from mutuality of assent, sometimes unrealistically described as a 'meeting of the minds,' between two or more parties having capacity to contract in an obligation based on consideration or the form of the agreement." (Williston on Contracts, Vol.1, p.2.)

VIII. The Term "Pre-hire" Does Not Apply To a Contract's Seven Day Union Security Clause.

The case of *Progressive Construction Corp.*, 218 NLRB No. 209, 89 LRRM 1465 (1975) cited on page 8 of Petitioners' Brief does not hold that the term "pre-hire" does not describe all contracts under 8(f) inasmuch as, they contend, the agreement can be entered into where the employer already has a complement of employees. In *Progressive*, the issue was whether or not the *seven day Union security provision* (clause 2 of 8(f)) operates only as to "pre-hire" agreements. The Board held it does not.

CONCLUSION

Wherefore, Respondents respectfully pray that the Writ of Certiorari herein be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of April, 1982, three true and correct copies of the foregoing Opposing Brief Of Respondents To Petition For Writ Of Certiorari To the United States Court Of Appeals For the Fifth Circuit were served on Counsel for Petitioners by depositing the same in the United States Mail with first-class postage pre-paid and addressed to:

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